Supreme Court of the United States

THE UNITED STATES OF AMERICA, owner of the Steamships "Clio," "Moosabee," "Fort Logan" and "Morganza" et al.,

against

AMOS D. CARVER and JOSEPH B. MORRELL, copartners doing business under the firm name and style of Baker, Carver and Morrell.

No. 402
October
Term, 1922.

BRIEF FILED AS AMICUS CURIAE.

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BRIEF FILED AS AMICUS CURIAE.

This brief is filed as amicus curiae by the undersigned counsel who represent New York Harbor Dry Dock Corporation, which is libellant in an action pending against the United States of America, in the Southern District of New York, involving among others the questions certified to this Court in the instant case.

Statement of Facts.

The facts as found by the Circuit Court of Appeals for the Second Circuit in the instant case show that the libellants below, who were ship chandlers, furnished and delivered to the SS CLIO and SS MORGANZA articles coming within the definition of supplies and necessaries in maritime law, the orders for which were given by the marine superintendent or port captain, of the State Steamship Corporation, which was in possession of the vessels under bare boat charter parties with options of purchase. The owner of the vessels was the United States of America. The charter parties to the State Steamship Corporation provided that the charterer should man, equip and supply the vessels at its own expense, pay the stipulated sum for charter hire, and at the termination of the charter period, was to have the option of purchasing the vessels at a stipulated price per ton, upon which was to be credited the amount already paid as charter hire.

The libellants had no knowledge of any fact tending to show that State Steamship Corporation did not own the CLIO prior to the completion of deliveries to said vessel. They did, however, have knowledge that the MORGANZA was in possession of the State Steamship Corporation under a partial payment purchase plan from the U. S. Shipping Board prior to furnishing supplies to said vessel but made no inquiry as to the terms of said contract..

Liability of the vessels was asserted under the "Act relating to liens on vessels," etc., approved June 23, 1910, and the "Merchant Marine Act,

1920," approved June 3, 1920, and that of the United States under the Act "Authorizing Suits against the United States in Admiralty," etc., approved March 9, 1920. The District Court granted a decree for the said supplies against the United States, with right of recovery over after payment from the estate in bankruptcy of the State Steamship Corporation. The United States appealed from this decree and the Circuit Court of Appeals certified the case to this Court upon the following questions:

"Under the statutes enumerated, or any of them:

"(1) Would a maritime lien for necessaries or supplies have arisen as against Clio,—had that vessel been privately owned?

"(2) Would a maritime lien for necessaries or supplies have arisen as against Morganza,—had that vessel been privately owned?

"If either or both of the foregoing questions are answered in the affirmative,

"(3) Is the United States liable for the amount of what would have been a lien—had the vessel affected been privately owned?

"If either or both of questions 1 and 2 are answered in the negative:

"(4) Is the United States liable for the personal indebtedness of State SS Corporation, in respect of supplies and necessaries furnished to a vessel, in respect of which no maritime lien would have arisen—had such vessel been privately owned?

POINT I.

A maritime lien for necessaries or supplies would have arisen as against Clio had that vessel been privately owned. The first question certified should be answered in the affirmative.

The supplies furnished to the CLIO were delivered not later than April 20, 1920, and are therefore governed by the Act relating to liens on vessels, approved June 23, 1910, Chapter 373, Section 1, 36 Stat., 604. This statute provides in general as follows:

Section I. Any person furnishing repairs supplies and other necessaries

> "to a vessel, whether foreign or domestic, upon the order of the owner or owners of such vessel, or of a person by him or them authorized shall have a maritime lien on the vessel which may be enforced by a proceeding in rem, and it shall not be necessary to allege or prove that credit was given to the vessel."

Section 2. The following persons are presumed to have authority from the owner to procure such supplies and necessaries:

> "the managing owner, ship's husband, master, or any person to whom the management of the vessel at the port of supply is intrusted. No person tortiously or unlawfully in possession or charge of a vessel shall have authority to bind the vessel.".

Section 3.

> "The officers and agents of a vessel specified in Section 2 shall be taken to include such officers and agents when appointed by a charterer, by an owner pro hac vice, or by an agreed purchaser in possession of the vessel, but nothing in this Act shall be construed to confer a lien when the furnisher knew, or by the exercise of reasonable diligence could have ascertained, that because of the terms of a charter party, agreement for sale of the vessel, or for any other reason, the person ordering the repairs, supplies, or other necessaries was without authority to bind the vessel therefor."

The facts found by the Circuit Court of Appeals show that the supplies and necessaries were furnished by the libellants to the Clio on the order of State Steamship Corporation, which was lawfully in possession of the vessel under a charter party from the United States. State Steamship Corporation as owner pro hac vice of the CLIO was a "person to whom the management of the vessel at the port of supply is intrusted," as said term is used in Section 2 of the Act. City of Milford, District Ct. Md., 1912, 199 Fed., 956; Thomas W. Rogers, Dist. Ct. East. Dist. N. Y., 1912, 197 Fed., 772, affirmed C. C. A., 2nd Circ., 207 Fed., 69; The Oceana, Eastern Dist N. Y., 233 Fed., 139, affirmed C. C. A., 2nd Circ., 1917, 244 Fed., 80; New York Trust Company vs. Bermuda Atlantic SS Co., 211 Fed., 989; The Bud III, 250 Fed., 918; The Lord Baltimore, The Penn. C. C. A., 3rd Circ., 1921, 273 Fed., 990, 276 Fed., 118; The St. Johns, C. C. A., 4th Circ., 1921, 273 Fed., 1005.

State Steamship Corporation was presumed to have authority to create a lien upon the vessel, under Section 2 of the Act of 1910 for the supplies furnished to the vessel and libellants were entitled to rely upon this presumption unless they "knew or by the exercise of reasonable diligence could have ascertained" that under the terms of the charter party State Steamship Corporation was "without authority to bind the vessel therefor." The certified facts show that the libellants did not know of the charter party at the time they delivered the supplies to the Clio or of any fact tending to show that State Steamship Corporation did not own the vessel. Could they have ascertained these facts by the exercise of reasonable diligence? Does the term "reasonable diligence" as used in the Statute require one who is dealing with a person lawfully in possession of a vessel (and who has no other knowledge of that person's title) to make inquiry as to the terms under which it has such possession? The Circuit Courts of Appeals for the Second, Third, Fourth and Fifth Circuits have answered the latter question in the negative. The Oceana, 244 Fed., 80 (83); The Yankee, 233 Fed., 919 (926); St. Johns, 273 Fed., 1005; The Yarmouth, 263 Fed., 250. Petition for writ of certiorari was denied in The Oceana, 245 U. S., 656; and in The Yankee, 254 U. S., 12, but was granted in the St. Johns, which is now before this Court for decision. If these cases correctly interpret the statute the answer to the first question certified in the instant case must be "yes."

It is contended by the United States that The Valencia, 17 Sup. Ct. Rep., 323, 165 U. S., 264, is controlling here, and that The Oceana, The Yankee,

The St. Johns and The Yarmouth (supra) are not good law. This contention is manifestly unsound. True, The Valencia decided that one who supplied coal to a vessel on the order of a charterer, without knowing whether the person ordering the supplies was owner or charterer, was placed upon notice of the terms of the charter party, and where that instrument provided that the coal was to be paid for by the charterer and not by the owner, did not obtain a lien upon the vessel. But The Valencia was decided under the general maritime law and prior to the statute of 1910, which changed the rule formerly existing and greatly restricted the rights of vessel owners (The Oceana, 244 Fed., 81, 82) among other things by increasing the list of those presumed to have authority to bind the vessel. The statement of this Court in Piedmont Coal Company vs. Seaboard Fisheries Co., 254 U. S. 1 (11) of the changes made by the Act, was general in character and was, it is believed, never intended to specify in detail all the changes made by the Act.

The Act of 1910 provides that "the managing owner, ship's husband, master or any person to whom the management of the vessel at the port of supply is entrusted" is presumed to have authority from the owner to procure repairs, supplies and other necessaries and to create a lien upon the ship therefor. Prior to the Statute, under general maritime law, the only person presumed to have this authority was the master, and then only when the vessel was in a foreign port. At the time of the Valencia decision, a dealer who received an order to furnish supplies to a vessel from any person other than the master was *ipso facto* placed on inquiry as to the authority of the person with whom

he dealt. The owner himself at that time could not place a lien upon the vessel except by agreement. The libellants in the Valencia case dealt with one who was not the master and *ipso facto* were put upon notice of its lack of authority. They should have inquired. Such inquiry would have elicited the information that by the terms of the charter party the charterer ordering the coal was itself obligated to pay therefor. The libellants therefore were held to have failed in their proof of what it was necessary for them to prove under the general maritime law then prevailing, namely, the *actual authority* of the charterer to bind the vessel.

The situation since the enactment of the Statute is entirely different. The statutory presumption created by the Act in favor of the authority of a charterer or owner pro hac vice to bind the vessel has shifted the burden of proof from the furnisher of supplies and necessaries to the vessel owner, who, in order to rebut the statutory presumption, is now required to show that the charterer or owner pro hac vice has no authority to create the lien. The supply man under the Statute now makes out a prima facie case against a vessel by (1) showing an order from the managing owner, or ship's husband, or master, or any person to whom the management of the vessel at the port of supply is intrusted (including a charterer in possession or owner pro hac vice) and (2) delivery to the vessel of the necessaries and supplies so ordered. Under the presumption created in his favor by the statute he is entitled to hold the vessel upon this state of facts in the absence of any other facts. The Yankee, 233 Fed., 919 (926). The burden is then upon the ship owner to show that the terms of the

charter party under which the person ordering the supplies had possession of the vessel, restricted the presumed right of said person to create the lien and that the libellant knew of this charter party restriction, or by due diligence might have learned thereof.

The law in effect when The Valencia was decided required the supply man to prove the authority of the charterer in possession or owner pro hac vice ordering the supplies to create the lien; the law in effect since the enactment of the Act of 1910 gives the supplyman a presumption in favor of the authority of the charterer in possession or owner pro hac vice to create such lien and places upon the owner the burden of rebutting that presumption. Had the case of the Valencia arisen after the Act of 1910 was passed, we submit it would have been decided in favor of the libellants. The rule there laid down is not controlling and does not govern the instant case.

> "The putative lienor is not bound, whenever he gets an order to supply or serve the ship, to institute an inquiry, else he would never be safe and the act would be idle." The Muskegon, 275 Fed., 117, affirmed C. C. A. 2nd Circ., 275 Fed., 348.

See also to the same effect The Oceana, The Yankee, The St. Johns and The Yarmouth, supra.

There was therefore no duty upon the libellants herein to inquire as to the authority of State Steamship Corporation to create a lien on the Clio as they were entitled to rely upon the presumption given by the Statute.

Even if the libellants had notice of the terms of the charter party under which State Steamship Corporation had possession of the Clio and were bound thereby, they would still be entitled to recover against the vessel had she been privately owned because of the fact that the charter party provisions not only failed to rebut the charterer's presumed authority to create a lien on the vessel, but impliedly gave it this power under the doctrine laid down in the South Coast (251 U. S., 519). This subject we will discuss at length under Point II infra.

POINT II.

A Maritime lien for necessaries or supplies would have arisen as against Marganza had that vessel been privately owned.

The second question certified should be answered in the affirmative.

The question of whether or not there would have been a lien on the MORGANZA for the supplies furnished to her had she been privately owned is to be determined by the provisions of the American Merchant Marine Act of June 5, 1920 (Jones Bill) since the goods were delivered after the passage of said Act. The portions of this Act governing liens (Subsections P. to T. inclusive) are practically identical with the Act of 1910 with towage added as a necessary. What has been said in Point I, in reference to the Act of 1910, applies

with equal force to the American Merchant Marine Act of 1920.

The Circuit Court of Appeals found that prior to furnishing the supplies and necessaries to the MORGANZA the libellants were aware of facts and circumstances putting them on inquiry as to the terms of the contract under which State Steamship Corporation held said vessel, that they made no inquiry but chose to avoid the same. Knowledge of such facts undoubtedly bound the libellants to inquire as to the terms of the contract between the United States and State Steamship Corporation, and upon their failure to so do they are bound by what they would have learned had they inquired. If the charter party rebuts the statutory presumption of the charterers' right to create a lien, then libellants must necessarily fail; if it does not the libellants' action must be sustained. The presumption stands in the place of proof until the contrary is proved. Puget Sound Electric Railway, et al. vs. Benson, 253 Fed., 710 (C. C. A. 9th Circ.).

The mere fact that the charterer was to pay for the supplies by the terms of the charter party is not now sufficient to rebut this presumption (South Coast, 251 U. S., 519), as it was at the time of The Kate, 17 Sup. Ct. Rep., 135, 164 U. S., 458, and The Valencia, 17 Sup. Ct. Rep., 323, 165 U. S., 264. When The Kate and The Valencia were decided there was no presumption in favor of the charterers' right to create a lien and the burden was upon the libellants to show actual authority. Today the burden is upon the owner to prove lack of authority of the charterer (See Point I supra). Who is to pay for the supplies as

between owner and charterer is one thing; whether or not the charterer may create a lien on the vessel for those supplies is quite another. The liability between owner and charterer as to the final payment for supplies is a matter of contract between those parties. The liability of the ship to the supply man for the supplies is a question of public policy.

The terms of the charter party certified by the Circuit Court of Appeals in the instant case do not restrict the presumed right of the charterer to create a lien upon the vessel. They do not prohibit the creation of such a lien. On the contrary, they impliedly admit the right to create such a lien. They provide that the charterer will

> *"not suffer nor permit to be continued any lien, encumbrance or charge which has or might have priority over the title and interest of the owner in said vessel,* but the charterers will in due course, and in any event within fifteen days after the same become due and payable, pay, discharge or make adequate provision for the satisfaction or discharge of every lawful claim or demand which, if unpaid, might in equity, in admiralty, at law or by any statute of this or any other nation where said vessel may be navigating or berthed, have priority over the said title and interest, or might operate as a lien, encumbrance or charge upon said vessel, or cause its detention in port; *or will cause said vessel to be released or discharged from any such lien, encumbrance or charge in any event within fifteen days after such lien, encumbrance or charge is imposed upon said vessel."* (Italics ours.)

This clause is very similar to the one in the South Coast, 251 U. S., 519, which this Court said:

> "recognizes that liens may be imposed by the charterers and allowed to stand for less than a month and there seems to be no sufficient reason for supposing the words not to refer to all the ordinary maritime liens recognized by the law."

In the South Coast the charter party provided that all expenses of operation of the vessel were to be borne by the charterer but this Court held that the charter party did not rebut the statutory presumption that the charterer had the right to create the lien but rather supported such presumption.

The instant case is on all fours with the South Coast. If the charterer is to release the vessel from liens within fifteen days after such have been imposed on said vessel, then by clear implication it has the right to pledge the vessel for those fifteen days. If it has the right to create the lien *at all* then the lien binds the ship irrespective of the conditions as to time. If the owner and charterer had intended that the charterer was not to create any liens upon the vessel, they would undoubtedly have expressed their intention in a few simple words such as these: "The charterer is not to create or allow to be created any lien or charge upon the vessel and is not to make any purchases for the vessel's account." The failure to make some such clear provision in the charter party leaves the presumption unrebutted. The dictum of Judge Ward in The Oceana, 244 Fed., 80 (81), that a somewhat similar clause to that involved in the charter party in the instant case was added under excess of

caution and did not imply the right to create a lien is to be deemed overruled by the South Coast, as it was urged on the briefs of appellant's counsel in the South Coast case and clearly brought to this Court's attention.

But it is said that the doctrine of the South Coast decision is restricted to cases of supplies ordered by the master (The Portland, 273 Fed., 402, and The Cratheus, 263 Fed., 693). It is submitted that such a position is untenable. The Statute does not differentiate between the presumption of the master's authority and that of the managing owner, ship's husband or person to whom the management of the vessel at the port of supply is intrusted. The South Coast offers no foundation for such a distinction. The purpose of the Statute was to unify the law on this subject and for this purpose it gave each of the four classes of persons who were authorized therein to bind the vessel the benefit of the same presumption.

The following cases are easily distinguishable. Northwestern Fuel Co. vs. Duckley-Williams Co., C. C. A., 7th Circ. (174 Fed., 121), was decided before the enactment of the Act of 1910. Great reliance was placed upon this case in the brief of appellants in the South Coast but from this Court's opinion therein it is apparent that the principles laid down in the Northwestern Fuel Company case were considered no longer applicable.

The Cratheus (C. C. A., 5th Circ., 263 Fed., 693). The vessel was under a time charter, not a demise, with the owner still in possession by officers and crew. There was no provision whatsoever in the charter party regarding the charterers' right to creat a lien and no clause such as in the

instant case from which the right to create a lien might be implied. The case was decided on the principle that a charterer under such a form of charter party was not presumed to have authority to bind the vessel for necessaries under the statute and the charter party did not show actual authority. The Court said:

> "The statute does not create a presumption that a charterer, unless he is also either the 'ship's husband, master or a person to whom the management of the vessel at the port of supply is intrusted' has authority from the owner to procure repairs, supplies or other necessaries for the vessel. No lien on a vessel is given for supplies procured by one having no such relations to it that, under the terms of the statute, he is presumed to have authority from the owner to procure supplies."

In other words the Court held in effect that a mere time charterer is not a person to whom the management of the vessel at the port of supply is entrusted, which position is undoubtedly correct.

POINT III.

The United States is liable for the amount of what would have been liens upon Clio and Marganza had these vessels been privately owned. The third question certified should be answered in the affirmative.

The Shipping Act of 1916 (39 St. L., 728), provided that vessels purchased, chartered or leased from the Shipping Board, while employed as

merchant vessels should be subject to all the laws, regulations and liabilities governing merchant vessels, whether the United States be interested therein as owner in whole or in part. The effect of this Act was to allow actions in rem against such Government owned vessels. The Lake Monroe, 250 U. S., 246. Merchant vessels belonging to the Shipping Board were thereafter seized by United States marshals under process in rem in the same manner as privately owned vessels.

Such seizures caused considerable inconvenience to the Shipping Board and the Emergency Fleet Corporation, the agencies of the United States for the operation of these vessels, and at their instance Congress passed the Act of March 9, 1920, entitled: "An Act authorizing suits against the United States in Admiralty," etc. Section 1 of this Act provided.

> "That no vessel owned by the United States or by any corporation in which the United States or its representatives shall own the entire outstanding capital stock or in the possession of the United States or of such corporation or operated by or for the United States or such corporation, and no cargo owned or possessed by the United States or by such corporation, shall hereafter, *in view of the provision herein made for a libel in personam, be subject to arrest or seizure by judicial process in the United States or its possessions.*" (Italics ours.)

Section 2 provided that in cases where if such vessel were privately owned or operated, a pro-

ceeding in admiralty could be maintained against her, a libel in personam could be brought against the United States, if such vessel was employed as a merchant vessel or as a tug boat.

The two sections when read together clearly show the intent of Congress to substitute an action in personam against the United States for the action in rem against the vessel which had theretofore existed. The first section clearly states that the reason why the Government owned vessel should no longer be subject to arrest or seizure is "in view of the provision herein made for a libel in personam."

We understand the position of counsel for the United States to be that section 1 rendered merchant vessels owned by the United States immune from arrest, while Section 2 failed to create any liability on the part of the United States, although it consented that the United States be sued. Such reasoning is difficult to follow. The new action in personam against the United States was a substitute for the old action in rem against the vessel, which was abolished by the statute. By giving this substitute the United States obtained freedom of its merchant vessels from arrest. How can it now then say that although it has obtained this freedom from arrest for its vessels, it is under no liability to respond to actions in personam provided for by the same act as a substitute for the right of arrest.

Undoubtedly the right of suit against the sovereign will not be extended beyond the cases specified in the statute giving the right to sue, as stated in Schillinger vs. United States, 155 U. S., 163; 15 Sup. Ct. Rep., 85. In the instant case, however,

the right in personam against the United States was so obviously an exchange for the right in rem against the vessels of the United States that the liability of the Government is unquestioned. The terms of the statute are clear and unambiguous and judicial interpretation thereof is unnecessary.

Respectfully submitted,

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New York, November 28, 1922.

In the Supreme Court of the United States.

OCTOBER TERM, 1922.

THE UNITED STATES OF AMERICA, OWNER of the Steamships Clio, Mooseabee, Fort Logan, and Morganza, et. al.,
v.
AMOS D. CARVER AND JOSEPH B. MORRELL, copartners doing business under the firm name and style of Baker, Carver and Morrell.
No 402.

REPLY BRIEF FOR THE UNITED STATES.

In this reply brief it may be profitable to indicate the possible interpretations of the suits in admiralty act, together with some of the difficulties which each interpretation may present.

I.

The act waives the immunity of the sovereign and permits the bringing of suit in personam against the United States, but does not create any new liability on the part of the United States. This is the construction urged by the Government in this case.

So interpreted, no difficulties in its application are presented. The rights of claimants against the United States or vessels owned or possessed by the

United States are the same as they would be if the United States were a private shipowner (but enforceable only by libel in personam) with the single exception that claims existing solely against such vessels may not be enforced as long as the ownership or possession of such vessels continues in the United States. This exception, whether the result of the oversight or the deliberate intention of Congress, merely leaves the claimant with respect to such claims in the same position in which he was prior to the shipping act of 1916.

The venue provisions of section 2 of the act thus interpreted present no difficulties. Claimants are free to sue the United States either in the district where they reside or have their principal place of business in the United States or where the vessel charged with liability is found.

The United States in the same manner as a private owner is entitled under section 6 of the act to the benefits of the limited liability act.

The provision of section 3 of the act, "Such suits shall proceed and shall be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties," can be given full effect.

The provision of section 3 of the act, "If the libellant so elects in his libel, the suit may proceed in accordance with the principles of libels in rem wherever it shall appear that had the vessel or cargo been privately owned and possessed a libel in rem might have been maintained," may be given the

effect which the framers of the act intended. Mr. Campbell, formerly admiralty counsel of the United States Shipping Board and the principal draftsman of the act, thus explained this provision in the hearing of August 28, 1919, before the Committee on Commerce of the United States Senate on S. 2253, an earlier bill out of which grew the present act (p. 17):

> If a ship is in collision while under the navigation of a compulsorily employed pilot, the ship can be libeled in rem on the theory that the ship has done the injury and is liable as a person; but if the owner of that vessel were sued in personam he would have a complete defence through the forced employment of the pilot. There may be circumstances where, in actions in rem, there may be different priorities accorded the claims from the priorities enforceable in actions in personam, although I have no case in mind at the present time. While I am prohibiting actions in rem, I am giving the litigants exactly the same rights as if they had proceeded in rem.

It is to be noted that the language used in section 3 is "owned and possessed," not "owned or possessed," thus indicating that the provision was to apply only where there was both ownership *and* possession.

II.

The suits in admiralty act permits a suit in personam against the United States on account of all obligations or liabilities incurred personally as owner

or operator of a vessel, and also on account of all liabilities of any vessel owned, in the possession of or operated by or for the United States, and creates a personal liability of the United States for such vessel liabilities with no limitation of such liability other than that permitted under the limited liability acts of the United States. This we understand to be the interpretation contended for by the libellants in these cases. So interpreted the act presents many difficulties.

Foremost among these difficulties is that under this interpretation a claimant against the United States may be placed in a far more favorable position than he would have been if the vessel were privately owned. While counsel in other cases do not hesitate to assert that this is the result of the act, it does not seem to be seriously contested by counsel in these cases that Congress could not have intended such a result. The legislative history of the act seems to make this entirely clear.

For illustration, let us assume that the United States is the owner of a vessel worth on January 1, 1920, $1,000,000. On that date, by a bareboat charter, it charters the vessel to A, thus constituting A owner *pro hac vice* of the vessel. A operates the vessel under this charter party during the year 1920 and incurs valid liens upon the vessel on voyage 1 for collision, amounting to $1,000,000, on voyage 2 for damage to cargo amounting to $400,000, on voyage 3 for supplies amounting to $200,000. On November 1, 1920, A becomes insolvent and abandons the

vessel, which is then taken possession of by the United States. During the year there has been a steady and rapid decline in vessel values so that at the end of voyage 1 the vessel was worth but $800,000, at the end of voyage 2 the vessel was worth but $600,000, and at the end of voyage 3 the vessel was worth but $400,000, and when in January, 1921, a libel in personam is brought against the United States to recover $1,000,000 on account of the vessel's liability for collision on voyage 1 the vessel is worth but $200,000. (It may be noted that in some actual cases the fall in vessel values has been infinitely greater than that in the supposed case.)

Under the interpretation of the act now under consideration the United States would be subject to a decree against it for the sum of $1,000,000 unless it could successfully limit its liabilities under the limited liability act of the United States, U. S. R. S. 4283–4287, and the act of June 26, 1884, sec. 18 (23 Stat. 54 c. 12).

But to what amount could it limit its liabilities? Under the provisions of the limited liability act to the amount or value of its interest in the vessel and her freight then pending at the close of the voyage upon which the collision lien arose. This would be $800,000 without considering the freight.

But what of its liabilities to the cargo damage claimants? Their claims arose upon voyage No. 2 and the limited liability proceeding with respect to the collision liability on voyage No. 1 would not affect the cargo damage claims. A second limita-

tion proceeding would therefore be necessary with respect to any suit in personam brought against the United States by these claimants, and in this proceeding the liability of the United States will be limited to $600,000, the value of the vessel at the end of the second voyage upon which these claims arose. Inasmuch, however, as these claims amount to only $400,000, the right of limitation would be ineffectual and the United States would be liable for the full amount of the claims.

The same situation would be presented with respect to the claims for supplies originating on voyage No. 3, and here again, no benefit will be derived from limitation proceedings and the United States will be liable for the full amount of the claims for supplies.

The net result of all these suits in personam against the United States under this interpretation of the suits in admiralty act would be that the United States would be compelled to pay decrees of $800,000, $400,000, and $200,000, or a total of $1,400,000.

On the other hand, what would be the situation of the private owner of the same vessel? Upon the facts stated, he would be under no personal liability whatever, as the claims all arose as a result of the operation of the vessel by the bare boat charterers. The various claimants would be able to assert their claims only against the vessel. The vessel arrested under a libel or libels in rem would be sold and her proceeds amounting to $200,000, her value at the time when she was arrested under the libels in rem

would be placed in the registry of the court, and thereafter distributed in accordance with their respective priority among all the lien claimants who had filed libels or who might intervene for the distribution of the fund. The various claimants would receive in all $200,000 instead of $1,400,000, as in the case where the vessel was owned by the United States. The private owner would lose his vessel worth $200,000 and would personally pay nothing. As opposed to this, the United States would be compelled to pay $1,400,000.

In such a case as *Blamberg* v. *The United States* where the vessel is physically in a foreign port still further difficulties are presented. If in such a case it be held that a suit in personam may be maintained against the United States, the only limitation of its liability possible would be with respect to claims in the United States. Limited liability proceedings in our courts have no extraterritorial effect and claimants who did not see fit to share in the limited liability fund in the United States will be free to pursue their remedies in rem against the vessel abroad. At the recent International Maritime Conference held at Brussels, one of the objects sought was an international convention to create a system of limited liability of vessel owners uniform and binding in all jurisdictions. As yet, however, no such system is in existence.

Nor is the situation aided by the suggestion of counsel for Blamberg Brothers that the vessel may be brought to the United States and there surrendered

in limitation proceedings. Apart from the practical difficulties and expense of such procedure, it would be necessary to pay the foreign claimants who had filed libels abroad against the vessel, and we know of no provision of law under which the owner in the limitation proceedings here would be entitled to ask for reimbursement out of the limited liability fund on account of liens which he was compelled to discharge abroad. If he had such right it would result in the foreign lien claimants receiving payment in full of their claims while the claimants here would only receive their share of what remained of the proceeds of the vessel.

It follows, therefore, that the limited liability acts of the United States can not be relied upon to place the United States in the same position as a private owner with respect to claims constituting liens upon the vessel, but for which neither the United States nor the private owner is under any personal liability.

III.

The liability of the United States in suits in personam brought against it pursuant to the provisions of the suits in admiralty act with respect to the liability of vessels owned by, in the possession, or operated by or for the United States, under circumstances creating no personal liability on the part of the United States is limited to the value of the vessel at the time when the libel in personam is brought against the United States.

This interpretation of the act has been advanced by the United States in certain cases as an alternative to the enforcement of a liability against the United States far in excess of any possible liability of a private owner in like circumstances. For example, in one case, liability was asserted for some $200,000, with the vessel at the time of loss worth substantially that amount. When the libel was filed two years later, the total value of the vessel was only $4,000. The United States procured an order directing the surrender of the vessel to the marshal of the court, the vessel was sold realizing $4,000, and the libellant accepted the amount so realized in full satisfaction of his claim against the United States. In no case has there been a determination by the court as to the right of the United States to thus discharge its liabilities as they may be created in the suits in admiralty act.

The difficulty of this interpretation of the act is found in the absence of any express provisions in the act thus limiting the liability of the United States. It may be, however, that this court will determine that in order to carry out and make effective the intent of Congress such limitation must be read into the act and the necessary procedure created by the court to carry it into effect. If this be the conclusion, certain questions must necessarily arise. Shall the action begun by a libel in personam proceed after the surrender of the vessel as though a libel in rem had originally been brought against the vessel, and must

all lienors be admonished to intervene in the proceeding and assert their claims or be forever barred of any right either against the vessel or against the United States?

Instead of surrendering the vessel to the court may the United States give a bond for the value of the vessel as of the date when the first libel in personam is filed against it? As the primary purpose of the suits in admiralty act was to prevent interference with the possession of the vessel by the United States it would certainly be necessary to provide some such method in lieu of surrender of the vessel, as otherwise the purpose of the act would be defeated.

What would be the limit upon the liability of the United States in a case where the vessel was not owned by the United States but merely in its possession or operated by or for the United States at the time when the libel in personam was filed? In such a case the value of the interest of the United States in the vessel might be practically nothing, and a bond in such value would be of no practical benefit to the libellants. If in such a case the vessel were lost while still in the possession of the United States, the libellants would be deprived of any substantial recovery at any time. On the other hand, it would be equally indefensible to require the United States, because of its temporary possession of the vessel, to furnish a bond for the entire value of the vessel which it did not own.

If this court should reach the conclusion that the interpretation of the act which we have been con-

sidering last is the proper interpretation, we respectfully suggest that in the interest of all concerned this court lay down a set of rules similar in character to those which it established under the limited liability act soon after that act was enacted. Such a procedure would avoid endless confusion and litigation.

Respectfully,

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○

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 402.

THE UNITED STATES OF AMERICA, OWNER OF THE STEAMSHIPS "CLIO", "MOOSEABEE", "FORT LOGAN", AND "MORGANZA",

Appellant,

vs.

AMOS D. CARVER AND JOSEPH B. MORRELL, COPARTNERS DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF BAKER, CARVER AND MORRELL,

Appellees.

BRIEF ON BEHALF OF APPELLEES, CARVER et al., IN ANSWER TO THE REPLY OF THE APPELLANT.

Since this case was argued, a decision has been rendered by the Circuit Court of Appeals for the Third Circuit in the case of *Phoenix Paint Co.* vs. *the United States of America,* which supports the arguments advanced by the appellees. This case was referred to in the argument

of the present case, and, as it has not yet been published in the Advance Sheets, we beg to bring this decision to the attention of this Court at this time. As the opinion has been printed in full as an appendix to Mr. Englar's supplemental brief in behalf of the appellees, Blamberg Bros., in the case of *Blamberg Bros.* vs. *the United States,* No. 165, October Term, 1922 (which brief has just been filed), we shall not burden the record by duplication of printing, but beg leave to refer the Court to the copy of the opinion annexed to that brief.

It is not the contention of the appellees that the Suits in Admiralty Statute of 1920 necessarily created a new liability, as counsel for the Government seem to take as their basic text in their reply brief. It is the contention, however, that the liabilities under which the Government was placed by the Act of 1916, as such liabilities existed at the time of the Act of 1920 (*The Lake Monroe,* 250 U. S. 246), were continued, but that the method of procedure to enforce them was transformed from *in rem* to *in personam*. Otherwise, what significance can be given to the words in the first section of the statute reading—"* * * shall hereafter, in view of the provision herein made for a libel in personam, * * *" and in Section 3—"that such suits shall proceed and shall be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties. * * * If the libelant so elects in his libel the suit may proceed in accordance with the principles of libels in rem wherever it shall appear that had the vessel or cargo been privately owned and possessed a libel in rem might have been maintained." That this was the intention of

Congress in passing the statute is evidenced by the quotation (see appellant's reply brief, page 3) from the argument of the draftsman of the bill, delivered before the Senate Committee, wherein he stated, among other things—

> "While I am prohibiting actions in rem, I am giving the litigants exactly the same rights as if they had proceeded in rem."

and further from the language in the draft of the original bill (H. R. 7124, July 1st, 1919, and S. 2253, June 23rd, 1919), wherein it was provided—

> "* * * in those cases where, if the United States were suable as a private party, a suit in personam could be maintained, or where, if the vessel or cargo were privately owned and possessed, a libel in rem could be maintained and the vessel or cargo could be arrested or attached at the time of the commencement of suit."

for which cumbersome clauses the Act as finally passed contains the more concise, collective clause —

> "* * * a proceeding in admiralty could be maintained at the time of the commencement of the action * * *."

The argument of the Government, under Point II, ignores the plain language of Section 6 of the statute, which carries with it "the benefits of all exemptions and of all limitations of liability accorded by law to the owners, charterers, operators or agents of vessels," which, of course, is broader than the single limitation of liability statute, R. S. 4283—4287, cited by the Government.

One of these exemptions given to a private owner is the surrender of the vessel. The Government has, in fact, in many cases adopted this very construction and practice, and has surrendered (or trusteed) the boat involved. See Neptune Line, Inc. *vs.* United States of America, as Owner of the S. S. "Fort Logan" (D. C. Va. 1922).

Under permission granted by this Court upon the argument of this case, a supplemental brief, on behalf of Appellant Blamberg, has been filed in the case of *Blamberg Bros.* vs. *the United States of America,* No. 165, October Term, 1922, (which case was argued with the present case) wherein a detailed reply has been made to the arguments advanced on behalf of the Government in the reply brief in the present case. To avoid duplication of argument, we beg leave to respectfully refer to the said brief, as a further answer to the contentions of the Government, advanced in its reply brief herein.

Respectfully submitted,

E. CURTIS ROUSE,
Counsel for Appellees.

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SUPREME COURT OF THE UNITED STATES.

THE UNITED STATES OF AMERICA, owner of the Steamships "CLIO," "MOOSEABEE," "FORT LOGAN," and "MORGANZA," *et al.*, *against* AMOS D. CARVER and JOSEPH B. MORRELL, co-partners doing business under the firm name and style of Baker, Carver and Morrell.	No. 402. OCTOBER TERM, 1922.

BRIEF ON BEHALF OF APPELLEES.

STATEMENT.

This cause is in Admiralty and comes before this Court upon a statement of facts and questions certified by the United States Circuit Court of Appeals for the Second Circuit.

The following is the exact wording of the questions (Certf. fol. 6):

> "(1) Would a maritime lien for necessaries or supplies have arisen as against "*Clio*" had that vessel been privately owned?
>
> (2) Would a maritime lien for necessaries or supplies have arisen as against "*Morganza*" had that vessel been privately owned?

If either or both of the foregoing questions are answered in the affirmative.

(3) Is the United States liable for the amount of what would have been a lien,—had the vessel affected been privately owned?

If either or both questions 1 and 2 are answered in the negative,

(4) Is the United States liable for the personal indebtedness of State S. S. Corporation, in respect of supplies and necessaries furnished to a vessel, in respect of which no maritime lien would have arisen, had such vessel been privately owned?''

It is appellee's contention that the first three questions should be answered in the affirmative, and the fourth be unanswered.

The facts are all set forth in the certificate and will not be repeated at length.

The Issues.

We understand the Government (appellant) contends on this appeal:

First, that the Maritime Lien Statutes do not give a supplyman the same position in dealing with a chartered or conditionally purchased vessel as he has in dealing with a vessel not operated under such a contract. In other words, the mere fact of the existence of a conditional purchase or charter contract deprives him of his lien, except under a separate pledge by the owner himself, whether he knew of the existence of such a contract or not. That is to say, that when such a contract exists, the Statute does not apply.

As to this the appellees take issue and contend, under the authority of *"The Southcoast"*, 251 U. S. 519, and *"The Oceana"*, 244 Fed. 80 (certiorari denied, 245 U. S. 656), that unless there is some absolute and unconditional prohibition in the contract, the existence of which is affirmatively brought home to the knowledge or attention of the supplyman at the time, the statute does apply and the supplyman is protected and secured by the lien given by that statute. Further, that *"The Valencia"*, 165 U. S. 264, has been overruled by the statute and the cases just named, and does not apply. This position was sustained by the trial Court and if approved by this Court would require an affirmative answer to the first two questions.

Second, that the United States is not sueable in admiralty under the "Suits in Admiralty Act" except when they, or their officers, have personally contracted for or ordered the supplies sued for. In other words that the suit named in the statute cannot be brought where an in rem suit only would lie, had the vessel been privately owned, but can be maintained only where both in rem and in personam suits could have been brought.

As to this issue it is the contention of the appellees that the language of the statute plainly says that the suit may be brought against the United States in any case where the vessel itself might have been sued in rem and held liable or its owners in personam, had the vessel been privately owned, and that since an in rem lien or cause of action existed here the suit was properly brought. Privity of contract is unnecessary. Therefore, the third question certified should be answered in the affirmative.

POINT I.

THE FIRST QUESTION CERTIFIED SHOULD BE ANSWERED IN THE AFFIRMATIVE.

A.

A maritime lien arose for the supplies furnished the S. S. "Clio" herein which would have been enforceable in rem had that vessel been privately owned.

Whether the contracts under which the State Steamship Corporation obtained possession of the *Clio* and *Morganza* be called conditional or partial payment purchase contracts or charters, the fact remains that they were a complete and absolute demise of the vessels. The corporation was the owner *pro hac vice* of the vessels at the time. That the corporation was in lawful possession has never been questioned.

The person ordering the supplies for these vessels was the person to whom the management of the vessels at the port of supply had been intrusted (Certificate, fol. 2).

The certificate states that these libelants had no notice or knowledge of any charter or contract under which the State Steamship Corporation held the *Clio*, or that they were other than owners, and that they had no cause to suspect the existence of one.

The paragraphs of the Maritime Lien Statute of 1910 (36 Stat. 604), material to the consideration of the question here presented, are—

> "Sec. 2. The following persons shall be presumed to have authority from the owner or owners to procure repairs, supplies, and other necessaries

for the vessel: The managing owner, ship's husband, master, or any person to whom the management of the vessel at the port of supply is intrusted.

* * *.

Sec. 3. The officers and agents of a vessel specified in section two shall be taken to include such officers and agents when appointed by a charterer, by an owner *pro hac vice*, or by an agreed purchaser in possession of the vessel, but nothing in this Act shall be construed to confer a lien when the furnisher knew, or by the exercise of reasonable diligence could have ascertained, that because of the terms of a charter party, agreement for sale of the vessel, or for any other reason, the person ordering the repairs, supplies, or other necessaries was without authority to bind the vessel therefor."

Since that statute demised vessels have uniformly been held liable *in rem*, and subject to liens for supplies furnished on the order of the representatives named in the statute, although appointed by charterers or conditional vendees in possession under such contracts and clauses as exist here. The various Circuit Courts have been uniform in their construction of this statute.

The Oceana (2nd Circ.), 244 Fed. 80 (cert. denied 245 U. S. 656);

The Yankee (3rd Circ.), 233 Fed. 919, 926 (cert. denied 243 U. S. 649);

The Penn (3rd Circ.), 276 Fed. 118;

The St. Johns (4th Circ.), 273 Fed. 1005, (affd.) 277 Fed. 1020 (cert. granted 257 U. S. 626);

The Ascutney (4th Circ.), 278 Fed. 991;

The Portland (9th Circ.), 273 Fed. 401;

The South Coast (9th Circ.), 251 U. S. 519.

See also in accord—

The Cratheus (5th Circ.), 263 Fed. 693.

During this continuous course of judicial interpretation, and largely resulting from the *Yankee* and *Oceana* decisions, there has grown up among ship supply and repairmen a general, universal understanding of the law to be that they need no longer initiate inquiry and searches as to charters, contracts and authority, so long as the possession is open and apparently lawful. They can safely rely upon a lien unless facts showing the contrary are brought home to them.

Is this well settled understanding and course of business now to be overturned and a worse chaos than of old to be restored?

The appellant, relying on a forced construction of certain language used in the decision in the *Piedmont Coal Company* vs. *Seaboard Fisheries Co.*, 254 U. S. 1, urges here, exactly as was unsuccessfully urged in *The Oceana*, that, in the case where a charter exists, the Lien Statute of 1910 does not apply, and that the rule of *The Valencia*, 165 U. S. 264, still obtains, and that a supplyman cannot obtain a lien where a charterer ordered the supplies.

What is the rule of *The Valencia* case so strongly relied upon by the appellant? In many, but not all, respects it is a similar case to the present one. The parallel appellant sets forth is not complete. The case was decided prior to the Lien Statute of 1910, at a time when there was a controlling rule of law known as the "home port doctrine" which, in effect, was that a supplyman furnishing a vessel in the home port, or port where the owner or operator resided, could obtain no lien except by ex-

press contract to that effect. There was a duty and burden on the supplyman of inquiring as to the home port of the vessel and at least to examine the name-plate on the stern before he could claim a lien (see *The Samuel Marshall,* 49 Fed. Rep. 754). If he furnished a vessel in her home port, he obtained no lien. If he furnished a vessel without making any inquiry as to her port and/or on the order of persons known to be residents of his own port, he did so at his peril, and would be deprived of his lien, if it developed that they were in possession of the vessel under charter or owned her. This gave rise to a duty on the supplyman of looking into the registry of the vessel. Every supplyman was charged with the duty of inquiry and on notice of anything such inquiry might disclose—such as charters or conditional possession. Under this state of the law, the coal was furnished to *The Valencia* in New York by Ziegler, upon the order of persons then in charge of the vessel. Both Ziegler and this purchaser (the New York Steamship Company) had their offices in New York, and had done business together for years. *The record discloses that the libelant understood the Steamship Company owned the vessel. They were thus furnishing her in her home port.* The salesman had been advised by the manager of the Steamship Company that they had her under a charter Neither the salesman nor the libelant made any inquiry whatsoever, even to the extent of looking up the registry of the vessel. They relied on a lien existing, although everybody concerned were in the same home port—a lien which they could not have under and by virtue of the rule of law prevailing at the time. The fact of there being a charter was not what put the libelant on notice. It was the fact that the purchaser and the supplyman were together in the same port

that put libelant on inquiry. That this is the turning point of the case is made clear by this Court in its opinion, at Pages 270 and 271, where it said:—

> "They were put upon inquiry, but they chose to shut their eyes and make no inquiry touching these matters or in reference to the solvency or credit of that company. It is true that libellants delivered the coal in the belief that the vessel, whether a foreign or a domestic one, or by whomsoever owned, would be responsible for the value of such coal. But such a belief is not sufficient in itself to give a maritime lien. If that belief was founded upon the supposition that the steamship company owned the vessel, no lien would exist, because in the absence of an agreement, express or implied, for a lien, a contract for supplies made directly with the owner in person is to be taken as made 'on his ordinary responsibility, without a view to the vessel as the fund from which compensation is to be derived.' *The St. Jago de Cuba,* 9 Wheat. 409, 416, 417. And if the belief that the vessel would be responsible for the supplies was founded on the supposition that it was run under a charter party, then the libellants are to be taken as having furnished the coal at the request of the owner *pro hac vice, Stephenson* v. *The Francis,* 21 Fed. Rep. 715, 717, *The Samuel Marshall,* 54 Fed. Rep. 397, 399, without any express agreement for a lien, and in the absence of any circumstances justifying the inference that the supplies were furnished with an understanding that the vessel itself would be responsible for the debt incurred. In the present case, we are informed by the record that there was no express agreement for a lien, and that nothing occurred to warrant the inference that either the master or the charterer

agreed to pledge the credit of the vessel for the coal."

Two legal objections to the lien were thus pointed out —*first*, if the purchaser was understood to be the owner, then the supply was, under the home port rule, on his credit alone except for a special contract for a lien; *second*, if the purchaser was understood to be a charterer, then the supply was on the order of one not the owner and was without express contract for lien and without investigation as to authority to give a lien or the presence of any circumstances implying such contract for lien. There was no express contract for a lien. There were no presumptions at that time. There are now.

Both of the objections thus pointed out by the court have been expressly eliminated by the lien statute of 1910 (and also that of 1920). First by dispensing with the so-called home port rule and the presumption of dealing on the credit of the owner only and secondly by expressly giving the presumption of a lien for supplies upon the order of any one of a certain class of persons whether appointed by a charterer or agreed purchaser or other owner *pro hac vice*. This did away with the requirement for the express contract for lien referred to in that decision.

The statute was passed directly after the *Valencia* decision and obviously to modify its harshness and yet render practical the protection of the lien for maritime supplies. This interpretation of the decision is supported by the opinions in the *Piedmont Coal Case* (254 U. S. 1) and in *The South Coast* case (251 U. S. 519).

There is nothing in the decision supporting the argument made by the appellant here that the mere fact of the existence of a charter prevents a supplyman procuring a lien and puts him on notice. On the contrary, the case supports the argument sustained in *The Oceana* and in the lower Court in this case, that there must be some condition or circumstance brought home to the supplyman which puts him on inquiry or notice of the existence of a restriction which would prevent his acquiring a lien. This is made clear by the concluding paragraph of the opinion, where the Court distinctly said (p. 272, italics ours):

> "We mean only to decide, at this time, that one furnishing supplies or making repairs on the order simply of a person or corporation acquiring the control and possession of a vessel under such a charter party cannot acquire a maritime lien *if the circumstances attending the transaction put him on inquiry as to the existence and terms of such charter party,* but he failed to make inquiry, and chose to act on a mere belief that the vessel would be liable for his claim."

The Court made an express reservation in its opinion, using the following language (page 272):

> "Under what circumstances, if under any, a charterer who has control and possession of a vessel under a charter party requiring him, at his own cost, to provide for necessary supplies and repairs, may pledge the credit of the vessel, it is not necessary now to determine."

thus leaving open the very question raised by the present case, and practically admitting that there were circumstances, even before the statute, where the supplyman could obtain a lien as under the facts in the present case. This gives force to the argument that there were extraneous conditions in *The Valencia* case which controlled the particular decision. It is no longer in point.

After the statute the first case to come before this Court was *The Yankee* (243 U. S. 649), where the vessel was in possession under a lease, and supplies were ordered by the lessee, with the exception of one particular order, which was placed by the master. This was a bareboat lease, and the master was the lessee's employee. The lease was not on file, but the lessee and the supplyman were doing business in the same home port. The vessel was then, however, at another place. There was no actual notice of the existence of the lease. The supplyman did not know of it, and made no inquiry. Had he made an inquiry, he would have found that the lease contained an absolute prohibition against suffering or permitting a lien to attach. The Court held that the supplyman had no constructive notice of the lease; that he had no duty under the statute to inquire; and that the fact that the purchaser and the supplyman were of the same port was no longer material. *Certiorari* was petitioned for stating these facts and pleading that *The Valencia* decision should be applied, and that the statute had been wrongfully construed. This petition was denied.

Shortly afterward, *The Oceana* came before this Court upon a similar petition (245 U. S. 656). In that case, the vessel was in the possession of a conditional vendee under a contract to operate and purchase. It was a bareboat

form. The supplies were ordered by the marine superintendent, appointed by the vendee and in charge of the management of the vessel in the port. The owner had no part therein or knowledge thereof. All the supplymen furnished their materials to the vessel at her home port, New York, which was also the port in which the vendee, the supplymen and owner resided, and had their places of business. *The contract or purchase agreement was filed in the office of the County Clerk,* where the parties resided and the vessel was at the time. It was a public document and open to inspection of all who sought to examine it. This is the first and only case in which such document has appeared to have been recorded. None of the supplymen, however, examined the County Clerk's records. None of the supplymen actually knew of the sale of the vessel or of the contract or of the conditions under which the operator was in possession of the vessel. None of them made the slightest inquiry. The testimony in the record shows, and the Court found, that, had any of the supplymen made the slightest inquiry, they would have been informed of the conditional contract which attempted to deprive the purchaser of all authority to incur liens against the vessel until she was fully paid for and title had passed, and the purchasers agreed to pay for all supplies and to keep the vessel free from liens or, if a lien were asserted, to release the vessel therefrom by a bond. The contract provided as follows:—

> "Until said ship is completely paid for, the purchaser covenants as follows:
>
> a. To keep said ship clear of any liens from any cause, and if any lien or libel is filed or asserted, the same shall be immediately bonded by

> the purchaser. The purchaser agrees to promptly pay current bills for supplies and repairs to said ship, and exhibit at reasonable times the ship's accounts and bills to seller's representatives."

In that case, at the first hearing before the Commissioner and at every hearing afterward, even before the Circuit Court of Appeals and in the petition to this Court for the writ of *certiorari,* it was urged by the owner of the vessel that the statute did not apply and did not give a lien under such circumstances, and that the fact of the conditional purchase agreement, with the restraining clause, took the case out of the statute and brought it within the rule in *The Valencia* case, and that under the rule of that case there was, because this contract existed, a duty on the supplymen to initiate an inquiry. Each of the Courts held that the statute applied; that there was no burden on the supplyman to initiate an inquiry, even to the extent of examining records; that the rule of *The Valencia* was changed and that a lien accrued. This decision was, in effect, sustained by this Court by its denial of the petition for *certiorari,* and has apparently been confirmed by the decision in *The South Coast* (251 U. S. 519) and *The Jack O'Lantern,* 258 U. S. 96.

The rule urged by the appellant would bring back a worse chaos than ever existed before the statute. It would nullify in fact the entire point and force of the statute. It would require that every supplyman, on receiving an order, would have to imitate an inquiry, not as to the home port, it is true, but as to whether he was dealing with a representative of a charterer, vendee or other owner *pro hac vice.* If he found that he was deal-

ing with other than an owner personally, he would be obliged, at his peril, to inquire the exact authority of that person to order for the ship, and the fact that the person was in open, visible control of the management of the vessel at the port of supply or said he was the owner would be immaterial. He would be obliged to go to the original charter or contract or letter of appointment and record title. He could not rely on the statement of the purchaser or of the charterer. It is not always true that these charters or contracts are readily available. Therefore, the express words of the statute that these respective officers or agents, when appointed by a charterer, agreed purchaser in possession, or owner *pro hac vice,* are to have the same authority as when appointed by the owner, or as the owner himself, would be expressly nullified. It seems too clear for extended argument that this could not have been the intention of the framers of the statute.

It is urged by the appellant that this difficulty would be cured by insisting on the order being signed by the master. The weakness of this lies in the fact that usually these charters are bareboat form, where the master is the appointee of the charterer, or agreed purchaser in possession. He has no greater authority than they, and, being the appointee of the charterer or vendee, his authority must necessarily be subject to the same inquiry. The master, as master, has no inherent power, in absence of the statute, to pledge the credit of the vessel. He never could do it in the home port, or where the owner was present. He could not do it in a foreign port unless necessity was shown, and also he had no funds and the owner had no credit. But by Section 2 of the statute he

is now given that power and is placed in the same class as managing owner, ship's husband or any other person such as the marine or port superintendent, or captain, to whom the management of the vessel, at the port of supply, is entrusted.

This is the force of the decision of this Court in *The South Coast,* 251 U. S. 519, as applied to the present case. The appellant is endeavoring to distinguish that case, on the ground that the supplies were ordered by the master and therefore the charter provisions, restraining the authority of the charterer, were immaterial. That was a bareboat charter and the master was the appointee of the charterer. If the distinction is sound, Sections 2 and 3 of the statute, placing the master on the same footing as the marine superintendent, are a nullity. If the distinction is sound there is no point in the language used by the Court in commenting on the clause giving a limited time within which liens might remain.

B.

There was nothing in the contract or charter to prevent a lien.

Assuming that the libelants had inquired as to the contract and its provisions, they would have found the clause, set forth in folio 3, as follows:—

> "The charterers will not suffer nor permit to be continued any lien, encumbrance, or charge which has or might have priority over the title and interest of the owner in said vessel; but the charterers will in due course, and in any event within fifteen days after the same becomes due and pay-

> able, pay, discharge, or make adequate provision for the satisfaction or discharge of every lawful claim or demand which, if unpaid, might, in equity, in admiralty, at law, or by any statute of this or any other nation where said vessel may be navigating or berthed, have priority over the said title and interest, or might operate as a lien, encumbrance, or charge upon said vessel, or cause its detention in port; or will cause said vessel to be released or discharged from any such lien, encumbrance, or charge in any event within fifteen days after such lien, encumbrance, or charge is imposed upon said vessel * * *."

This clause clearly contemplates that a lien may, in the course of operations, be incurred, and that this lien may be continued to exist for a limited time; that the vessel may be arrested to enforce such lien and may continue under such arrest for a limited time. It is practically the same clause which this court said in *The South Coast* (251 U. S. 519) was not a prohibition; it is nothing more than an agreement between the owner and the purchaser that the vessel will be released from such encumbrances promptly. Practically the same clause was so construed in *The Oceana* (*supra*). A much stronger clause was used in *The Yankee* (*supra*), and held not to be binding on the supplyman to the extent of preventing a lien.

The lien was not denied, in *The Valencia* case, because of the language of the clause, but because of the home port rule.

It is submitted, therefore, that, had the libelants inquired and searched, they would have found no provision

preventing the lien which they had asserted in this case.

The first question should, therefore, be answered in the affirmative.

POINT II.

THE SECOND QUESTION CERTIFIED SHOULD BE ANSWERED IN THE AFFIRMATIVE.

A.

A maritime lien arose for the supplies furnished the S. S. "Morganza" herein which would have been enforceable in rem had that vessel been privately owned.

This question relates to the S. S. *Morganza*. The circumstances as to order and delivery were the same as the *Clio*, with the single exception that libelants' salesman, Cunningham, had, while on a trip to Washington on another matter, been advised, before this order, by someone, that the State Steamship Corporation had this vessel in its possession under a conditional or partial payment purchase contract—i. e.,—was agreed purchaser in possession (Fol. 3). He was not told that it contained any restrictions as to their authority over her, or their right to incur liens upon her, and he made no inquiry (Fol. 3). Had he done so, he might have located a copy of the contract (Fol. 3) containing the same clause set out and discussed under Point I-B, *supra*. He never reported to his employers what he had heard, and they did not ever know of the existence of the contract or of its terms.

If this did not put libelants on notice or inquiry as to the alleged restrictive clause, (and appellees contend it

did not), the claim as to this vessel is no different from that on the *Clio*, in first question, and the lien should be allowed. The Lien Statute of 1920, Sections P, Q, R and S, of the Merchant Marine Act, was in force when these supplies were ordered, but was, in all respects material herein, the same as the Statute of 1910, discussed above.

B.

There was nothing in the contract to prevent a lien.

If it did put the libelants on inquiry, the material point is that, even if the libelants had inquired, they would have found the contract, but it contained no prohibition against the incurring of a lien on the vessel for these supplies, and they would have been in no different position (see argument under Point I-B, *supra*), as the clause was the same as in the S. S. *Clio* contract.

In view of the decisions in *The South Coast, The Yankee* and *The Oceana,* it is submitted that libelants were entitled to a lien against the S. S. *Morganza,* and that this second question certified should be answered in the affirmative.

POINT III.

THERE BEING A RIGHT TO A LIEN IN REM AGAINST THE S. S. CLIO AND S. S. MORGANZA, HAD THEY BEEN PRIVATELY OWNED, THIS SUIT WAS MAINTAINABLE UNDER THE ACT OF MARCH 9, 1920, KNOWN AS THE "SUITS IN ADMIRALTY ACT."

THE THIRD QUESTION CERTIFIED SHOULD BE ANSWERED IN THE AFFIRMATIVE.

This libel was for necessary supplies furnished and delivered to the vessels upon the order of one of the officials specified in the maritime lien statutes, namely, the person, appointed by the agreed purchaser or charterer, to whom the management of the vessels was then entrusted.

Under the lien statutes of 1910, and also 1920, there can be no doubt that a furnisher of supplies to a vessel acquired a maritime lien, therefor enforceable in admiralty in a suit against the vessel in rem.

As has been argued in Points I and II above, these libellants would have had a lien against the vessels had they been privately owned, which lien could have been enforced in admiralty by the arrest of the vessels in suits in rem.

Under a lien the vessel itself is obligated to pay. Its owner is also obligated to pay or forfeit the vessel by reason of that lien—often without having been a party to a cause of that lien.

The vessels were owned, in fact, by the United States of America, by and through the Shipping Board. They were merchant vessels employed as such.

The question here presented is as to whether, under the Suits in Admiralty Act of 1920 a suit against the United States as owner of the vessels can be instituted where the United States did not contract the debt so as to make it, as owner, were it a private corporation, liable to a suit in personam.

It may be conceded that as a general proposition of law government-owned property may not be seized, nor the government be sued in its own courts, except by its own consent or waiver of its immunity. This govern-

ment had, long ago, granted its consent to be sued in a certain limited class of cases and in certain courts by the Tucker Act and the Court of Claims Act. In those statutes it specifically reserved certain immunities.

When the Shipping Board was created in 1916 and the government entered upon owning and operating merchant vessels in commercial pursuits the Act of Sept. 7, 1916, was passed by Congress. Section 9 thereof provided, in part:

> "Every vessel purchased, chartered, or leased from the Board shall, unless otherwise authorized by the Board, be operated only under such registry or enrollment and license. Such vessels while employed solely as merchant vessels shall be subject to all laws, regulations, and liabilities governing merchant vessels, whether the United States be interested therein as owner, in whole or in part, or hold any mortgage, lien, or other interest therein."

This provision was held by this court to be a consent of the government that the vessels of the United States so employed be subject to suit and arrest just as any other vessel privately owned would be. (The *Lake Monroe*, 250 U. S. 246.) In that case this court sustained the arrest of the vessel for collision damage inflicted while the vessel was operated in commercial service.

The effect of this holding was that the immunity of the vessels so employed was at an end. To prevent interruptions in the use of public vessels by frequent arrest public interest required that the immunity be restored, but that the individual, having a right which could have been asserted had the owner been a private corporation,

should be protected by a remedy. The answer was the approval by Congress on March 9, 1920, of the so-called Suits in Admiralty Act (41 Stat. 525), which in words and effect restored the immunity of the vessels from arrest but gave the right to sue the United States in all cases where the party would have been able to sue the vessel or its owners in admiralty had there been private ownership. The provisions of the act material to this case are:

> "That no vessel owned by the United States * * * shall hereafter, in view of the provision herein made for a libel in personam, be subject to arrest or seizure by judicial process in the United States * * *.
>
> Sec. 2. That in cases where if such vessel were privately owned or operated, * * * a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, a libel in personam may be brought against the United States * * * provided that such vessel is employed as a merchant vessel * * *.
>
> Sec. 3. That such suits shall proceed and shall be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties. * * * The suit may proceed in accordance with the principles of libels in rem wherever it shall appear that had the vessel or cargo been privately owned and possessed a libel in rem might have been maintained. * * *"

If the language used means anything at all it means that the United States has consented to be sued in any

case where one of its vessels or the owner could have been sued had it been privately owned.

There is no limitation in the statute to those cases where the United States was a party to the cause of action by reason of its having contracted or been in operation of its own vessel and would thus be liable in personam. It gives the right in all cases where it is interested by ownership in the ship which might be subject to arrest.

In most cases of in rem liability there may not be the in personam liability also—as for repairs and supplies furnished in foreign port on order of ship's husband or master—and yet the owner must pay or lose his vessel. This statute obviously covers such cases. See opinion of the District Court, E. D. Va., in Eastern Transportation Co. *vs.* U. S. A. (not yet reported) where it is said—

> "So it would seem that Congress, in the passage of the Act of March 9th, 1920, intended to waive its claim of immunity, and place itself upon a parity with other ship owners engaged in similar trade and traffic; to take upon itself the same obligation that by law it imposes upon others in like business. If it had not so intended, the addition of a few words to paragraph 2 of the quoted section would have made that determination manifest and beyond question. A reservation of immunity in suits sounding in tort is contained in the Tucker Act, and in the Court of Claims Act. It is absent in the Suits in Admiralty Act; and it would, it seems to me, be to assume the unthinkable to say that the draftsman of the latter act did not have in mind the different regulatory statutes then in effect, or that Congress did not intend to make the

> obligation to observe these statutes as much the duty of a government owned vessel, engaged in private enterprise, as of a privately owned vessel, likewise so engaged. Not only, therefore, does the express language of the Act, but equally the failure to limit its terms, lead to the conclusion of an abandonment of immunity, under the circumstances obtaining in the instant case."

This creates no new liability. Under the statute of 1916 the government merchant vessel could be sued in rem. (The *Lake Monroe, supra.*) This was in reality a suit against the United States, for if the charterer was defunct the government had to pay or lose the vessel. Now the liability to pay is the same. The nature of enforcement is transferred to a suit in personam only.

Were this not true then the limitation of the statute against arrest would apply only to cases where there was privity of contract by the government. Then the liberal rule of arrest of the vessel under the statute of 1916 would apply in all cases where the vessel was under charter or in the hands of third parties who contracted the cause of action without the privity of the United States. The immunity from arrest could not be taken to be general, when it is solely "in view of the provision herein made for a libel" and the right to libel be so limited as contended by the appellant. The vessel then would be subject to seizure for a bill contracted by charter in a suit in rem (*Lake Monroe, supra*), but not for a bill contracted by the United States itself. It is hardly to be deemed probable that this was the intention of Congress or the meaning of the statute. It is, however, the necessary result of the argument of the appellant.

Suits under this statute against the United States for supplies furnished upon the order of charterers of government vessels have been sustained where the only right to sue is the ownership of a vessel liable in rem.

The Ascutney (D. Ct. Md.), 278 Fed. 991.
Phoenix Paint Co. vs. *U. S. A.* (D. Ct. Pa.), not reported.

And the construction of the statute contended for by the appellees has been sustained by the Circuit Court of Appeals for the Second Circuit in the recent, but unreported, case of Cunard S. S. Co. *vs.* U. S. A. (*S. S. Isonomia*), November, 1922.

The government itself has recognized this construction of its parity of liability with the private owner under this statute by taking proceedings to limit liability through surrender and sale of its vessel responsible for the cause of action. (Neptune Line, Inc., *vs.* U. S. A. as owner of the S. S. *Fort Logan*, D. C. E. D. Va. 1922.)

The present suit was therefore maintainable under the statute and the third question should be answered in the affirmative.

POINT IV.

THE FOURTH QUESTION CERTIFIED SHOULD REMAIN UNANSWERED.

It is not the contention of libellants-appellees that by virtue of the statute of March 9, 1920, a liability is

imposed on the United States where there exists only an in personam right against the charterer and no lien on the vessel in rem or no in personam right against the government by way of contract or privity.

If the fourth question is addressed to such a situation it may remain unanswered for the reason that such a question does not arise on the facts herein. There was a right to a lien on the vessels in this case. The vessel was obligated to pay. Its owner was obligated to pay by reason of that lien.

Conclusion.

The First, Second and Third questions certified should be answered in the affirmative.

Respectfully submitted,

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SUPPLEMENT.

Since the foregoing brief went to press, counsel has received a draft of the brief herein on behalf of the Government, and begs to submit the following in reply to certain portions thereof.

The Kate, 164 U. S. 458 (Pages 9 *et seq.*) is much relied upon, but is not in point herein, and should be eliminated from the argument, because of the distinction that the decision turns upon the fact of a long-continued course of business between the parties under a general contract, during which course of business the supplyman obtained actual knowledge of the charter. He knew of the ownership, as he had dealt with the owners in relation to the same vessel under the contract. There is the further distinction that the charterer was not in possession of the management and control of the vessel at the port of supply—he was merely lessee of space. The case merely holds that, in view of the actual knowledge the supplyman had, he "ought reasonably to be charged with knowledge" of the further terms of the charter, which is a vastly different thing than holding that he was charged with the duty of inquiry beyond that imposed upon him by the home port rule, which was discussed in detail in "*The Valencia.*"

On Page 10 and on Page 29 of that brief, it is stated that the rule in *The Valencia* was followed in *The Oceana*, 244 Fed. Rep. 80. Exception is taken to this, as the most casual examination of the records and of the petition to this Court for a writ of *certiorari* would show the contrary and that the lower Courts, after having considered

the very arguments advanced by the appellants here, held that *The Valencia* case had been expressly overruled by the statute and was no longer controlling under the circumstance there disclosed. (See Pages 11 to 13 of appellee's brief).

On Pages 15 and 16, appellants admit that under the contract certain liens were to be permitted. The liens named are such as grow out of the operation of the vessel by the charterer, and there is no valid distinction between them and the lien for supplies for use in that operation. The argument therefore is a tacit admission of the contentions of the appellees herein—that under the contract in this case these liens could be incurred by the State Steamship Corporation.

Reference is made on Pages 22 and 23 to certain cases prior to the statute, with special emphasis on the two cases involving *"The Secret."* When examined, these cases emphasize the effect of the home port rule on the burden of inquiry.

At the foot of Page 37 it is said:—

> "While the claimant's right in such a case to proceed against the operator of the vessel is in no way affected by the act, it is quite true that his only valuable remedy may be against the vessel. But even the denial of the right to proceed against the vessel would only mean a postponement of the claimant's remedy until the vessel had passed into private hands, and at the time of the passage of the suits in admiralty act coincident with that of the merchant marine act of 1920, it was the expecta-

> tion of Congress that all of the vessels owned by the United States should pass into private hands as promptly as possible."

This clause is part of an extended argument that the Government is an innocent party not in privity to the contract for the supply, and, therefore, that it would be a hardship to compel it to pay through such a suit, the lien against the vessel. The remarkable feature advanced in this argument is that, while the vessel is exempted from arrest, and the Government may take back the vessel, recharter her for an indefinite period, or even sell her, the remedy of the supplyman must remain in a sort of suspended animation until the boat is actually sold to some new private owner. In other words, that, because it is a hardship to compel the Government, as owner, to pay the lien, the Courts should construe the statute so as to allow the claim to be enforced later against the innocent purchaser from the Government. One effect of this would be that the Government could not, and would not, give clear titles to purchasers of vessels from it; another effect would be that an innocent purchaser would be subjected to immediately losing his vessel on a claim incurred without his knowledge, and long before his interest in the vessel, and without having had the benefit of receiving her charter hire during the period in question, the Government having received that benefit; and a third, but very important effect, would be, that the supplyman would be so long postponed that he would be met with the defense of laches, and the difficulties of assembling his proof. The argument is highly fallacious and inequitable.

On Pages 39 and 40 it is argued, as a defense to the force of the statute, that this construction will give to the supplyman greater security than the value of the vessel, and greater than if privately owned, as it would subject to liability the entire financial resources of the Government which may greatly exceed the interest of the Government in the particular vessel incurring these liens. There is a complete answer to this argument, and that is, that the statute places the Government in the same position as a private owner, and leaves open to him the privilege of limiting his liability to the value of the res by the surrender and sale of his vessel, and the deposit in Court of the fund. This theory has been accepted by the Government, and has been availed of in several cases. (See *Neptune Line, Inc.*, vs. *U. S. A. as owner of the Steamship "Fort Logan"*, D. C. E. D. Va. 1922, not yet reported), where, in May of 1922, the Government surrendered and caused to be sold the *"Fort Logan"*, which was one of the vessels originally involved in the present suit.

Respectfully submitted,

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Of Counsel for Appellees.